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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92048271
Party	Plaintiff Rhino Linings USA, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 1,698,407
Date of Issue: June 30, 1992

RHINO LININGS USA, INC.,)	
Petitioner,)	
)	
vs.)	Cancellation No. 92048271
)	
RAPID RACK INDUSTRIES, INC.,)	
Applicant.)	
)	

**PETITIONER’S REPLY IN SUPPORT OF MOTION TO COMPEL, MOTION TO DEEM
REQUESTS FOR ADMISSIONS ADMITTED, AND MOTION FOR SANCTIONS**

Petitioner Rhino Linings USA, Inc. (“Petitioner”), by and through the undersigned counsel, and respectfully requests that the Board consider this Reply in Support of its Motion to Compel, Motion to Deem Requests for Admissions Admitted, and Motion for Sanctions (the “First Motion For Sanctions”). Rapid Rack’s Opposition to the First Motion for Sanctions consists only of (1) *ad hominem* attacks on Petitioner’s counsel, and (2) arguments contending “trust us, it’s in there.” Although Rapid Rack regrettably has chosen to resort to casting aspersions, Petitioner’s counsel will not make a point-by point rebuttal or respond in kind. Petitioner’s counsel merely notes that the personal attacks in Rapid Rack’s opposition brief are neither warranted nor true. They are an effort to distract from the deficiencies in Rapid Rack’s discovery responses. If one looks beyond the superficial explanations made by Rapid Rack, those deficiencies remain.

1. The volume of Rapid Rack’s document production should not give the appearance of responsiveness when the documents produced do not support Rapid Rack’s contention that it used the RHINO RACK Mark in commerce between 2000 and 2006 and do not rebut the evidence that Rapid Rack committed fraud on the Trademark Office.

Rapid Rack baldly asserts that it complied with its discovery obligations because it has produced approximately six hundred pieces of paper. However, the size of Rapid Rack’s production is

not at issue; rather, the issue is whether Rapid Rack's document production is responsive to Petitioner's Requests for Production of Documents and Things. Even a cursory review of Rapid Rack's document production demonstrates that the documents are non-responsive and do not show use of the RHINO RACK Mark during the relevant time period. The document production consists of the following:

- Summary information about invoices that do not show use of the Mark in commerce (RR100001 to -35).
- Summary sales information that do not show use of the Mark in commerce (RR100036 to RR100070).
- Approximately 500 pages in invoices for sales of RR4805, identified as the "RINO RACK" from 1998 to 2002, with one sale to a Central American price club in 2003 and two sales of five total shelves to a single Rapid Rack employee in 2004. These invoices do not use the Mark and do not indicate that the Mark was used. (*See* Rapid Rack Dep. (Doc. 24), at 40:23 – 46:5; 60:10-24). These invoices also show sales of GRL-3012, to which the Mark was added in 2007 (RR100071 to -504, -508 to -511).
- An undated label for GRL-3012, which according to Rapid Rack's document production was first sold in 2007 (RR100505).
- A picture of boxes in a warehouse, dated 5/21/2008, well beyond the relevant time period (RR100506).
- A picture of a box for GRL-3012 (first sold in 2007) dated 5/21/2008, well past the relevant time period (RR100507).
- A picture, apparently taken in 2008 also, showing a product which appears to be item GRL-3012 next to another product bearing a GORILLA RACK Mark (RR100512).
- An Inventory Sales History Report showing Rapid Rack's discontinuation of item RR4805, apparently sometime in 2002 (RR100513 to -514, -516 to -520, -526-27).
- An undated box design that Rapid Rack's Rule 30(b)(6) deposition designee did not recognize (RR100515; Rapid Rack Dep., at pp 57-58).
- Screen prints concerning sales made outside of the relevant time period (RR100521).
- A "confidential" Rhino Rack product line catalogue, which lists certain products for which no sales invoices or other evidence of distribution has been produced or otherwise provided (RR100528 to -535).
- An invoice from a graphic development company dated 12/10/2006, which shows that Rapid Rack obtained a "new look" for twelve boxes that would contain a "Rhino line" of products (RR100536).

- The assembly instructions for the GRL-3012-5 product sold beginning in 2007 (RR100537 to -538).
- What appears to be the design for a box carton for the RR4805 product bearing a 1997 copyright date (RR100539).
- A specimen showing the Mark on a box carton for GRL-3012, which was sold beginning in 2007 (RR100540).
- Written quotes and invoices from a printing company for printing assembly instruction sheets in Spanish for RR4805 from 1998 to 2002.
- Specimens showing the Mark on box cartons for GRL-100 and GRL-110, each of which has a 2006 copyright date (RR1-00567-68). Rapid Rack's Rule 30(b)(6) deposition designee testified that he was unaware of these products bearing the Mark before 2007. (*See* Rapid Rack Dep., at 40:23 – 46:5; 60:10-24)
- A picture dated 1/04/2004 of the Spanish assembly instructions for RR4805 (RR1-00569).
- Portions of a filing Rapid Rack made with the Trademark Office on 4/9/02 (RR1-00570-71).
- A file folder and contents concerning the redesign of the packaging for RR4805 in 1998 (RR1-00572 to -583).
- An article dated October 21, 2004 from the San Gabriel Valley Tribune which states that a 20 x 20 foot section of Rapid Rack's plant "which stores racks and shelves" was damaged during a storm (RR1-00584-85)
- Screen prints reflecting sales of RR4805 outside of the relevant time period (RR1-00586 to -590). Rapid Rack's Rule 30(b)(6) designee admitted that these screen prints did not reflect actual use of the Mark. Rapid Rack Dep., at 40:23 – 46:5; 60:10-24)

2. There are numerous Requests for Production of Documents for which Rapid Rack has not produced documents, and Rapid Rack should acknowledge that it has not produced responsive documents to these Requests.

As the foregoing description of Rapid Rack's document production indicates, Rapid Rack has not produced a single specimen of use or other documentary evidence of use for its RHINO RACK Mark for 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, or 2006. Such evidence plainly would have been responsive to Petitioner's Requests for Production of Documents Nos. 1-7, 9-15, and 17-23, each of which requests either a specimen of use and/or other documentary evidence in commerce for each year from 2000 to 2006.

For Requests Nos. 1-7 and 9-15, Rapid Rack objected on the grounds of relevancy (notwithstanding that abandonment of the Mark is the core issue in this cancellation) and then stated that “relevant, non-privileged documents, if any, responsive to this request will be produced.” (Docs. Nos. 9, 12, at Exh. 1). Rapid Rack should be compelled to provide accurate responses to these requests which indicates that it has not produced any such documents.

For Requests Nos. 17-23, Rapid Rack has objected improperly on the grounds that, by seeking specimens of use in commerce “that are self-authenticating as to the date of use,” Petitioner is somehow seeking a legal conclusion. Although it was not apparent before, Rapid Rack’s Response Brief suggests that the affected Requests seek a legal conclusion because (for some unspecified reason) the Federal Rules of Evidence do not apply to a specimen of use, only to other documents, such that its counsel would have to determine what constitutes a self-authenticating specimen of use. (Doc. No. 20, at P. 13-14). Although this argument is absurd on its face, the objection should have been withdrawn in any event after Petitioner’s counsel sent a letter to Rapid Rack’s counsel explaining what was meant by the term “self-authenticating.” (Docs. Nos. 9, 12, at Exh. 3). Rapid Rack’s objections are unfounded, and it should be required to acknowledge that it has no responsive documents.

3. Rapid Rack has improperly denied Requests for Admissions under circumstances where the language of Rapid Rack’s response plainly indicates that the Requests for Admissions should have been admitted.

Requests for Admissions 4, 9, 14, 19, 24, 29, and 34 seek admissions that Rapid Rack cannot produce a specimen of use of Registrant’s Mark in commerce in each year between 2000 and 2006. In fact, Rapid Rack did not produce any such specimens of use in response to Requests for Production of Documents Nos. 1-7, 9-15, 17-23, or 25-32. However, rather than make the admissions required by Rule 36 of the Federal Rules of Civil Procedure, Rapid Rack answered each such request by stating, “[D]espite a reasonable inquiry, the information known or readily obtainable by Registrant is insufficient to enable [Rapid Rack] to admit or deny the statement and [Rapid Rack] therefore denies the same.” If a reasonable inquiry did not result in Rapid Rack locating such a specimen of use, then

the correct response to each such request is “Admitted.” Rapid Rack should not be permitted to avoid providing a responsive answer. The Board should deem these requests for admissions admitted.

4. Rapid Rack has failed to provide information on the dates and manner in which the Mark allegedly was used in commerce with respect to its products.

Interrogatory No. 1 asks for the products which Rapid Rack provides, has provided, or intends to provide under the RHINO RACK Mark, “including the date(s) of first use in commerce and in interstate commerce of [the] Mark for each product identified.” Rapid Rack has listed a number of products, but has failed to answer any of the quoted portion of the interrogatory. If, as Rapid Rack contends, it actually used the Mark during the relevant time period, one would think that Rapid Rack would provide this information. The possible reason for Rapid Rack’s non-responsiveness came out during Rapid Rack’s Rule 30(b)(6) deposition, during which its designee testified that he was completely unaware of any non-speculative evidence of actual use of the RHINO RACK Mark prior to 2007. (Rapid Rack Dep., at pp. 36:14 – 40:17; 76:20 – 84:14).¹ Although Petitioner finally obtained an answer by taking the deposition of Rapid Rack, Rapid Rack should be sanctioned for its attempt to withhold this evidence in written discovery.

Interrogatory No. 5 asks for the manner in which Rapid Rack used the Mark in connection with its products. Again, not wanting to explain that it used the Mark in connection with one product RR4805 for a brief period of time and then discontinued using the mark for a more than three-year period of time before returning to the Mark in 2007, Rapid Rack has provided an evasive answer. Rapid Rack’s non-responsiveness to this interrogatory also should result in sanctions.

5. Rapid Rack has failed to provide any evidence concerning the validity of the 2002 Declaration of Use, which is at the heart of the claim for fraud on the Trademark Office.

Throughout the written discovery process in this case, Rapid Rack has repeatedly refused to

¹ By withholding the information regarding the dates of use in connection with the product numbers requested by Interrogatory No. 1, Rapid Rack was able to provide partial answers to Interrogatories Nos. 6-13 (regarding channels of distribution) that masked its abandonment of the Mark. For example, Rapid Rack has partially answered Interrogatory No. 10 by providing distribution information for GRL-100 and 110 in 2004. Significantly, however, neither product bore the RHINO RACK Mark in 2004. (See Petitioner’s Brief in Support of its Motion for Summary Judgment, Doc. No. 23, Exh. II, at pp. 6-13)

answer questions that would force it to admit that the 2002 Declaration of Use it submitted to the Trademark Office was fraudulent. For example, Interrogatory No. 34 asks Rapid Rack to “[p]rovide the complete factual basis for the averment that [the] Mark was in use in commerce . . . as set forth and contained in the [2002 Declaration of Use].” Rapid Rack chose not to give a factual basis, instead objecting on the grounds that the interrogatory was “overly broad, unduly burdensome and harassing . . . neither relevant to the claim or defense of any party in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence” and that it may have called for privileged information. Even when it was reminded that there was a pending claim that the 2002 Declaration of Use was fraudulent, Rapid Rack refused to respond substantively to Interrogatory No. 34. Rapid Rack’s Response Brief does not even attempt to explain why it has refused to respond to this Interrogatory. (Doc. No. 20, at p. 11-12). Pursuant to TBMP § 527.01(e), Rapid Rack should be estopped from presenting evidence regarding the accuracy of the 2002 Declaration of Use, and other appropriate sanctions should be entered:

A party that responds to a request for discovery by indicating that it does not have the information sought, or by stating objections thereto, may be barred by its own action from later introducing the information sought in the request as part of its evidence on the case

Similarly, in Request for Production No. 39, Rapid Rack was asked to produce “[a]ll documents which [it] relied upon in preparing the [2002 Declaration of Use].” Rapid Rack again provided only boilerplate objections, and notwithstanding numerous requests from Petitioner’s counsel, Rapid Rack has refused to produce anything other than the fraudulent 2002 Declaration of Use itself. In its Response, Rapid Rack contends that it does not have any evidence that the 2002 Declaration of Use was accurate because the submission of that document pre-dated its current management. (Doc. No. 20, p. 17). Rapid Rack’s Rule 30(b)(6) deposition designee likewise testified that he did not know whether the 2002 Declaration of Use was accurate. (Rapid Rack Dep., at p. 40:10-22). Accordingly, Rapid Rack should be compelled to indicate that it has no responsive information or documents in its written discovery responses.

6. Rapid Rack has improperly denied Requests for Admissions based on its contention that it does not understand the meaning of clear and/or defined terms.

Rapid Rack has objected to and/or denied Requests for Admissions Nos. 5, 10, 15, 20, 25, 30, 35-72, 74-80, 82-84, and 88-89 on the grounds that it did not understand terms such as “part of calendar year 2007,” “all of calendar year 2007,” “industrial storage goods,” “consumer storage goods,” “Declaration of use,” and “Registrant’s Mark.”² Rapid Rack’s Response Brief has not even attempted to explain what it found confusing about these terms and instead has merely reiterated its refrain that these terms contain “numerous ambiguities” and its conclusory assertion that Petitioner’s First Motion for Sanctions is not persuasive. (Doc. No. 20, at. p. 19-20). Rapid Rack ignores the fact that Petitioner’s counsel sent a four-page letter on August 12, 2008 explaining the meaning of these unambiguous terms in order to avoid burdening the Board with this issue. (Docs. Nos. 9, 12, at Exh. 3). Even after being provided with this further explanation, Rapid Rack refused to provide supplemental responses. Accordingly, the Board should deem these requests for admissions admitted.

7. Rapid Rack’s responses to interrogatories and document requests indicate that evidence of use *may* have existed, but *may* have been destroyed or *may* have become inaccessible; however, Rapid Rack has refused to substantiate that assertion or to state unequivocally why it believes that such evidence existed or whether a diligent search has been conducted.

In response to Interrogatories Nos. 6-13 and 15-22 and Requests for Production of Documents Nos. 25-32, Rapid Rack either has provided no responsive information at all or has indicated that there may be additional information that may be responsive but that it is not being provided because it may have been damaged in a flood or may be on an old and possibly corrupt database. Rapid Rack has provided no basis for its speculation that there may be additional responsive information, but it nonetheless contends that Petitioner must go to extraordinary expense associated with traveling cross-country and having a third-party examine a database under the watchful eye of opposing counsel

² Rapid Rack also tries to make hay of a typographical error in the First Motion for Sanctions. Petitioner’s instructions to its Interrogatories stated that the defined terms therein applied to all other written discovery requests issued by Petitioner. In the First Motion for Sanctions, Petitioner accidentally indicated that this language was included in its Requests for Admissions. In any event, Rapid Rack did not follow the instruction and improperly pleaded “confusion” as a basis for refusing to respond to unambiguous discovery requests.

(because there allegedly may be privileged information on the database). Further, Rapid Rack's Rule 30(b)(6) deposition designee testified that he was not aware of responsive information being destroyed by storm damage to Rapid Rack's facilities. (Rapid Rack Dep., at pp. 76:22 – 81:13). For months, Petitioner has been seeking only a straightforward, unequivocal answer regarding whether or not information was destroyed or inaccessible. Rapid Rack's repeated failure to act in good faith and provide an unequivocal response should be met with sanctions.³

8. Rapid Rack has interposed inappropriate relevancy objections to discovery requests that plainly are calculated to lead to the discovery of admissible evidence, including discovery requests seeking information regarding Rapid Rack's use of GORILLA RACK instead of RHINO RACK in connection with its products.

Notwithstanding the fact that Rapid Rack's customer service representatives informed callers that Rapid Rack discontinued its use of the RHINO RACK product brand approximately five years prior to the filing of the Petition for Cancellation and replaced it with the GORILLA RACK line of products (Doc. No. 23, at Ex. II), Rapid Rack has refused to respond to discovery concerning the fact that it has distributed its products in connection with other marks than its RHINO RACK Mark. In particular, Rapid Rack has refused to provide answers or responsive documents to discovery requests concerning its use of other marks in response to Interrogatories Nos. 29-30 and Request for Production No. 37. Rapid Rack has not even addressed this failure with respect to the affected interrogatories and has stood on its boilerplate relevancy objection to the document requests in its Response Brief. (Doc. No. 20, at pp. 11-12, 15-16). Its abandonment of the RHINO RACK Mark so that it could use other marks would tend to "make the existence of any fact that is of consequence to the determination of the action [abandonment] more or less probable than it would be without the evidence." *See* Fed. R. Evid. 401 (defining relevance). Rapid Rack decision to withhold this evidence should be sanctioned.

³ In its Response, Rapid Rack claims that the information it has provided in response to Interrogatories Nos. 6-13 demonstrates use of the Mark between 2000 and 2007. This statement by Rapid Rack is completely inaccurate. Although the responses list retailers who distributed certain items, there is absolutely no evidence that any of these products bore the mark at any time from 2000 to 2006. *See* Petitioner's Brief in Support of its Motion for Summary Judgment (Doc. No. 23, at Ex. II).

9. Rapid Rack has avoided providing evidence of abandonment by refusing to provide information based on the company's knowledge and instead attempting to produce only that information which is known to current management.

In its Response Brief, Rapid Rack states that

The current management of [Rapid Rack] has been in place for about three years. Lacking knowledge regarding many of the discovery requests propounded by [Petitioner], [Rapid Rack's] management answered to the extent they [sic] possessed such knowledge.

(Doc. No. 20, at p. 4). Put differently, Rapid Rack believes that it may avoid providing answers in discovery based on lack of corporate memory, yet still remain free to produce additional or contradictory evidence to the Board. Rapid Rack was under an obligation to provide responsive information to questions directed to the company, and the lack of any individual's knowledge is not an excuse for its failure to provide a full, complete, and accurate answer to discovery:

[I]t is not uncommon to have a situation . . . where a corporation indicates that it no longer employs individuals who have memory of a distant event or that such individuals are deceased. These problems do not relieve a corporation from [responding] to the extent matters are reasonably available, whether from documents, past employees, or other sources. . . .

United States v. Taylor, 166 F.R.D. 356, 361-62 (M.D.N.C. 1996) (addressing discovery in the analogous Rule 30(b)(6) deposition context) (citations omitted). As Rapid Rack acknowledges that it made no effort to determine the information known to the company and instead attempted only to provide the knowledge of certain individuals, Rapid Rack has failed to respond in good faith to Petitioner's discovery, and Rapid Rack should be sanctioned accordingly, including by the imposition of the estoppel sanction set forth in TBMP § 527.01(e).

10. In its Response, Rapid Rack insists that certain information should have been requested during deposition examination instead of in written discovery, but Rapid Rack refused to provide that information during its Rule 30(b)(6) deposition.

Rapid Rack contends that it properly refused to answer interrogatories concerning, *inter alia*, a summary of the knowledge of company employees concerning use of the RHINO RACK Mark and the possibility that a flood damaged potentially responsive information. Tellingly, however, Rapid Rack

refused to produce a properly prepared designee to testify on these issues at its Rule 30(b)(6) deposition. Accordingly, Rapid Rack has refused to provide responsive answers to these and other questions in response to any discovery mechanism. This misconduct should result in sanctions.

CONCLUSION

Rapid Rack's First Motion for Sanctions does not seek additional evidence. It seeks accurate responses and for Rapid Rack to face the consequences of making evasive and non-responsive answers to discovery. For almost eleven months now, Rapid Rack has sought to avoid properly responding to discovery, because it is now apparent that proper responses would show that Rapid Rack submitted a fraudulent Declaration of Use to the Trademark Office and abandoned its RHINO RACK Mark. If Rapid Rack had evidence that its Declaration of Use was accurate or that it used the Mark during the relevant time period, it would have no reason to repeatedly dance around or ignore straightforward questions on these issues. But that is exactly what Rapid Rack has done, by producing numerous non-responsive documents, providing tortured denials of requests for admissions that are tantamount to admissions, and leaving damaging factual information out of interrogatory responses. Rapid Rack should be compelled to acknowledge its lack of evidence and to admit requests for admissions that it has answered evasively, and should be sanctioned for forcing Petitioner to conduct a Rule 30(b)(6) deposition to learn information that should have been provided in response to written discovery. Petitioner stands by its First Motion for Sanctions and asks that the Board grant it in all respects.

Respectfully submitted, this 27th day of October, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this day a true and correct copy of the foregoing document has been served this day by depositing a true copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first class postage prepaid envelope and properly addressed as follows:

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This, the 27th day of October, 2008.

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